SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 925

CHARLES A. TURNER,

Petitioner,

vs.

WABASH VALLEY COACH CO., A CORPORATION, GERTRUDE B. SALE, AS PRESIDENT OF WABASH VALLEY COACH CO., BURWELL W. SALE, AS SECRETARY-TREASURER OF WABASH VALLEY COACH CO., GERTRUDE B. SALE AND BURWELL W. SALE.

PETITION OF CHARLES A. TURNER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

BENJAMIN F. SMALL,
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Counsel for Petitioner.

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PETITION OF CHARLES A. TURNER FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA.

Your cross-petitioner, Charles A. Turner, in the above entitled cause, shows:

A.

Jurisdictional Statement.

Jurisdiction of this petition is based upon Section 237 of the Judicial Code amended Sub-section b, Section 344, Title 28 (U. S. C. A.). The petitioner set up its constitutional right under Section 1 of the Fourteenth Amend-

ment of the Constitution of the United States by way of a Motion to Dismiss the Appeal in the Supreme Court of Indiana.

The judgment appealed to the Supreme Court of Indiana was rendered in the Superior Court of Vigo County No. 2 for the use and benefit of the petitioner-corporation in a stockholder's suit brought by Charles A. Turner, plaintiff for and on behalf of Wabash Valley Coach Co.

This cross-petitioner, Charles A. Turner, who as a stockholder brought a derivative suit for and on behalf of the corporation in the Superior Court of Vigo County No. 2 and therein recovered the judgment appealed from, set up in the Supreme Court of Indiana his claim of right under Section 1 of the Fourteenth Amendment and also set up the claim of right of the corporation (the petitioner herein), under the same constitutional provision, each claim of right being separately asserted in the Supreme Court of Indiana in this cross-petitioner's Motion to Dismiss the Appeal. These claims of right arose upon the fact that no notice of the appeal was given to the petitioner herein, Wabash Valley Coach Co., as required by the statutes of Indiana governing vacation appeals, and from the fact that Wabash Valley Coach Co. was joined as an appellant through the agency of the same counsel who appeared for Gertrude B. and Burwell W. Sale, individually and respectively as President and Secretary of the petitioner-corporation, who were seeking to reverse the judgment rendered against them and for the use and benefit of the said corporation of which they were then officers.

This cross-petitioner set up claims that this dual representation and the joinder thereby effected were a denial of due process and the equal protection of the laws under *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 and *Glasser* v. *United States* (1942) 315 U. S. 60, 76, in that the dual legal represen-

tation was void and in breach of the trustee-obligation of the respondent officers to Wabash Valley Coach Co. and the cross-petitioner asserted that by virtue of maintaining the derivative suit as a stockholder he was entitled to assert his claim of right under the Constitution of the United States and also the corporation's claim of right thereunder, inasmuch as the denial of due process and the equal protection described deprived both him and the corporation of property without due process of law.

These claims of right were denied by the Supreme Court of Indiana inasmuch as it proceeded to decide the case on the merits ignoring the contentions of the said cross-petitioner that the Supreme Court of Indiana had no jurisdiction of the appeal because of the want of notice and the invalidity of the joinder of Wabash Valley Coach Co. as an appellant under said constitutional provision.

This judgment of the Supreme Court of Indiana was rendered on January 14, 1943, reversing the judgment of the trial court. This cross petitioner's petition for rehearing was seasonably filed on February 3, 1943, and overruled on February 8, 1943 (R. 131). The judgment of the trial court had ordered cancellation and surrender to the corporation 107.88 shares of capital stock which had been issued to Burwell W. Sale and acquired by Gertrude B. Sale and further enjoined the issue of further stock for less than par.

The judgment and opinion of the Supreme Court appears in *Wabash Valley Coach Company et al.* v. *Turner* (143) — Ind. — 46 N. E. (2d) 212, 218 (Official report not yet published). The portion of the opinion material to the issue presented herein appears as Appendix 1, page 59 in the brief of the Wabash Valley Coach Company in support of its petition for the writ herein.

The title to the cause as it appears in the assignment of errors in the Supreme Court of Indiana was as follows:

No. 27718.

WABASH VALLEY COACH CO., GERTRUDE B. SALE, *President;* WABASH VALLEY COACH CO., BURWELL W. SALE, *Secretary-Treasurer,* WABASH VALLEY COACH CO., GERTRUDE B. SALE, BURWELL W. SALE, *Appellants,*

vs.

CHARLES A. TURNER, *Appellee.*

The judgment below is set out on page 6 of this cross-petition and runs against both Gertrude B. Sale and Burwell W. Sale, individually and respectively as President and Secretary of the Wabash Valley Coach Company at the time.

The effect of the purported void joinder upon which the respondents, the Sales, relied was to have the corporation join with them to reverse the judgment in its favor recovered against them.

The motion of this petitioner to dismiss was filed after the briefing of the cause had been completed but before it was argued. The cross-petitioner points out that under the doctrine and rationale of stockholder's suit in Indiana and elsewhere, the corporation is an indispensable party and while it is formally joined in the trial court as a defendant, it is in reality the plaintiff, and while it may be dormant in the trial court, nevertheless when a judgment is recovered by the stockholder suing in its right, it cannot appeal from the judgment in its own favor. By the judgment it becomes vested with a property right in the judgment itself which cannot be taken away from it without its day in court. Under the vacation appeal statute governing this case notice

was indispensable to confer jurisdiction and the lack thereof could not be obviated by the void purported joining of the corporation as an appellant in the assignment of errors in the State Supreme Court filed by counsel selected by and representing its trustee officers against whom the judgment was recovered. The appeal statutes involved are noted on page 8 below.

The cross-petitioner contends that on account of integral nature of the issue presented to the Supreme Court as to the cancellation of shares of stock, which are contracts to which the corporation and the persons holding such certificates are parties and as to which the stockholders of said corporation necessarily are concerned, this issue cannot be determined in the absence of the corporation; that this affects the very power under the primary principles of jurisprudence, of the State Supreme Court itself to proceed in the absence of an indispensable party to determine that which in its absence is essentially indeterminable that this cross petitioner, plaintiff appellee, suing as a stockholder both for himself and other stockholders and for the corporation could not waive the presence of the corporation. The time of presenting the Motion to Dismiss was immaterial inasmuch as no judgment could be rendered between the parties without the presence of the corporation. Under *Hansberry* v. *Lee*, supra, a determination of the cause with the corporation represented by the unconstitutional dual representation would not have been *res judicata* and could be questioned years hence.

B.

The Opinion Below.

The proceedings, judgment and opinion of the Supreme Court in this case appears in *Wabash Valley Coach Co.*

et al. v. *Turner* (1943) — Ind. —, 46 N. E. (2d) 212, 218 (Official report not yet published).

I.

Summary Statement of the Matter Involved.

1. This cross-petitioner, Charles A. Turner, seeks by this cross-petition to review the judgment of the Supreme Court of Indiana rendered on January 14, 1943 in Cause No. 27718 in the Supreme Court of Indiana wherein this Cross-Petitioner was designated in the assignment of errors therein as the sole appellee. The judgment herein sought to be reviewed reversed a judgment of the Superior Court of Vigo County No. 2 wherein this petitioner suing on behalf of said corporation, the purported appellant below and the petitioner for the writ of certiorari in this court to review the same judgment); and also suing on behalf of himself and other stockholders recovered judgment against the persons designated in the title of the proceedings in this court as co-respondents with this cross-petitioner, namely Gertrude B. Sale as President of Wabash Valley Coach Co., Burwell W. Sale as Secretary-Treasurer of Wabash Valley Coach Co., Gertrude B. Sale and Burwell W. Sale.

The judgment recovered by this cross-petitioner for and on behalf of Wabash Valley Coach Co. in the trial court read as follows:

> "It is therefore ordered, adjudged and decreed by the Court that the temporary injunction heretofore granted in this cause be and the same hereby is made perpetual and permanent, and continued in full force and effect.
>
> "It is further ordered, adjudged and decreed that the defendant, Gertrude B. Sale, surrender to the defendant, Wabash Valley Coach Co., for cancellation, stock certificate No. 17 of said corporation, issued on

or as of the 17th day of September, 1929, to and in the name of said defendant, Gertrude B. Sale, and that upon surrender to it of said stock certificate No. 17 the defendant, Wabash Valley Coach Company, cancel or cause to be canceled upon its corporate records said stock certificate No. 17."

"It is further ordered, adjudged and decreed that the plaintiff recover his costs herein, taxed at $——" (R. 27).

The temporary injunction rendered in said cause read as follows:

"The court after hearing the evidence and after being duly advised in the premises herein, finds for the plaintiff; that a temporary injunction be granted as prayed for by plaintiff in his petition for injunction. And the Court further finds that said temporary injunction be granted, providing that no meetings of the stockholders are held.

"It Is Therefore Ordered, Adjudged and Decreed by the court that a temporary injunction be and is granted as prayed by the plaintiff in his petition, in full force and effect, and that said temporary injunction be and is granted under promise and providing that no meetings of the stockholders herein are held; all until the further order of this court" (R. 2).

Since the temporary injunction was granted "as prayed" by the plaintiff in his petition for injunction and this temporary injunction was made permanent by the final decree, the text of the prayer of the plaintiff's complaint relating thereto is now set out:

"Wherefore, Plaintiff asks and prays that said defendants Burwell W. Sale and Gertrude B. Sale and each of them be permanently enjoined from issuing to themselves, or to any other person, certificates for shares from the unissued shares of the capital stock of said corporation for a sum or sums of money or for

property less than the par value of said shares of capital stock or as payment for any debt shown on the books of the corporation to be due and owing to said Burwell W. Sale and Gertrude B. Sale, etc." (R. 15-16).

It follows therefore that there was a permanent injunction against selling the stock of the corporation for less than par (R. 15).

The final judgment was rendered upon a special finding of fact in favor of said Charles A. Turner and upon conclusions of Law (R. 26-27).

The complaint upon which the judgment was recovered alleged that 108.77 shares of the common stock of the corporation, known as Wabash Valley Coach Co., had been issued without consideration, and in violation of Sections 21 and 22, Chap. 35, Indiana Acts of 1921 and of Section 1, Chap. 206, Indiana acts of 1921 and were held by Burwell W. Sale and Gertrude B. Sale and prayed for the cancellation of said shares of stock and for an immediate restraining order and also a temporary and final injunction against the issue of further stock for less than par.

II.

Proceedings in the Supreme Court of Indiana.

2 (a) The appeal reached the Supreme Court of Indiana only as a "vacation appeal," and it was so characterized in the opinion of the court. (See opinion below—46 N. E. (2d) 212, 217.

It is not disputed that no notice of the appeal was given to the Wabash Valley Coach Co., and that applicable State Statutes and Rules of Court are mandatory in requiring notice of vacation appeals to be given to "adverse" parties. Sections 2-3206, 2-3212, 2-3214—B. Ind. R. S. 1933, and Rules 2-3 and 2-30, B. Ind. R. S.—1942 Supp.).

The only joinder of the Wabash Valley Coach Co., a co-defendant and the beneficiary of the judgment in the trial court, was through the act of Gertrude B. Sale as President of Wabash Valley Coach Co., and Burwell W. Sale as Secretary-Treasurer of Wabash Valley Coach Co., in selecting and employing the same attorneys, appearing for them in said cause, also to appear on behalf of the Wabash Valley Coach Co. in the Supreme Court of Indiana and to name and join it as an appellant thereby seeking to reverse the judgment rendered for the use and benefit of said corporation.

The assignment of errors was filed in the Supreme Court of Indiana on April 28, 1942, and after the cause was briefed upon appeal, on the 31st day of August, 1942 this cross-petitioner, Charles A. Turner, filed a verified Motion to Dismiss the Appeal (R. 31). The grounds therein asserted in substance were that no notice had been given to the Wabash Valley Coach Co. of the appeal as required under the Statutes and Rules of the Supreme Court in order to confer jurisdiction upon the Supreme Court in the case of vacation appeals, and that the joinder of Wabash Valley Coach Co. as an appellant was void in that it was effected through representation of the same counsel acting for the Sales, against whom the judgment being appealed from was recovered and also for the corporation for which the judgment was recovered; that the corporation was the beneficiary of the judgment recovered for its use and benefit against Burwell W. Sale and Gertrude B. Sale and that the said Sales were then officers of said corporation: and

> "that said officers could not by reason of the personal interest of said officers being directly in conflict with the interest of said corporation consent for and on behalf of said corporation to the same attorneys appearing for said corporation, when they were appearing for the said Sales and each of them, and when

said counsel were, as appears from Appellants' Brief filed herein, urging and contending that said judgment be reversed, and that said consent is void and of no effect and the recognition, by this court, of said representation on this appeal or the authority of said attorneys to prosecute an appeal on behalf of said corporation, will operate to deprive and will deprive this Appellee, as a stockholder, and said corporation, which is benefited by the said judgment, of the equal protection of the laws and of their respective property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States of America." (R. 35.)

The claim was also set up:

"That permitting said corporation to be bound by or treated, as an Appellant in this appeal, or as having been made a party to this appeal when no Notice was given, said corporation, and when it appears, upon the record, that its interest lies solely in supporting the judgment whereby it was benefited, will deprive the said corporation and this Appellee, respectively, of property without due process of law and will deny each of them of the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States of America." (R. 36.)

III.

3. Analysis of the Judgment and Opinion of the Supreme Court of Indiana.

Wabash Valley Coach Co. et al. v. *Turner,* 46 N. E. (2d) 212, Advance N. E. Report, March 3, 1943.

The Supreme Court of Indiana without specific mention or action with reference to the said Motion of Charles A. Turner to Dismiss the Appeal, rendered judgment as follows:

> "The judgment is reversed, with instructions to the trial court to restate its conclusions of law in conformity with this opinion, and to enter judgment for the defendants."

With reference to a similar motion filed in the name of Wabash Valley Coach Co. through counsel other than the counsel filing the assignment of errors in the name of the corporation, the State Supreme Court declared the proceeding to be a "vacation appeal" and acknowledged the necessity of notice to all interested parties who did not join. It held that the lack of notice to Wabash Valley Coach Co. was obviated in that:

> "There is no contention that the attorneys who filed the appeal were not then authorized by the then officers of the corporation to appear for the corporation and perfect the appeal for it. The other parties appellant were not required to take any further steps to bring the corporation into court, and their appeal cannot be defeated by the effort of new and later officers of the company to revoke the action of the former officers."

The Court thus misapprehended the contention of the petitioner that the "lodging of the appeal was void." The Court misapprehended the fundamental constitutional contention which was not, that the new officers were revoking "the action of the former officers," but that the action of the former officers in joining the petitioner as an appellant was void and the dual representation of adverse parties thereby effected was void under due process. The very power of the officer of a corporation to use his office for his personal advantage but against the interest of the corporation was involved. In the words of Mr. Justice Douglas in *Pepper* v. *Lytton,* 308 U. S. 309, 311:

> "He can not use his power for his personal advantage but to the detriment of the stockholders and credi-

tors no matter how absolute in terms that power may be and no matter how meticulous he is to observe technical requirements."

The court further held:

"It is obvious that the corporation is a mere nominal party with no interest in the result of the action which is a controversy between stockholders."

This cross-petitioner urges that this holding is unsubstantial and untenable. This clearly appears from the rationale of stockholder's suits prevailing in Indiana and which the decision in this case did not profess to alter. The rationale of these derivative suits is that set out by Pomeroy in Equity Jurisprudence (1941 Ed.) Sec. 1095, Vol. 4, p, 276, as follows:

"But it is absolutely indispensable that the corporation itself should be joined as a party,—usually as a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been directly violated, or because the cause of action is *his,* or because *he* is entitled to the relief sought; he is permitted to sue simply *in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained belongs to the corporation, and not to the stockholder plaintiff. The corporation is therefore an indispensably necessary party, not simply on the general principles of equity pleading that it be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no such direct interest in

the subject matter nor in the relief. In fact the plaintiff has no such direct interest; the corporation alone has a direct interest; the plaintiff is permitted notwithstanding his want of interest to maintain the action solely to prevent an otherwise complete failure of justice." (Earlier Editions carried same statement.)

Pomeroy's rationale is expressly approved and followed in *Tevis* v. *Hammersmith* (1903), 31 Ind. App. 281, 283, 284.

We quote the following from *Carter* v. *Ford Plate Glass Co.* (1882), 85 Ind. 180, 182:

> "The answer of the Ford Plate Glass Company is deemed unimportant, for the reason that this company was beneficially the plaintiff, and was only made a party in order to conclude it by the litigation. The only theory upon which appellants are allowed to maintain this action is, that the Ford Plate Glass Company, whose duty it was to bring and prosecute the suit, was in the hands of its enemies, and therefore could not sue. For that reason, the appellants, being stockholders of the alleged defrauded company, are allowed to sue, the company being the real beneficiary if the suit is successful."

The *Carter* case is specifically based upon the holding of *Davenport* v. *Dows* (1873), 85 U. S. 626, 627, where among other things, speaking of these suits, it is said:

> "This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation and not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it."

Davenport v. *Dows* is followed by *Porter* v. *Sabin* (1893), 149 U. S. 473, 478, 479; See also *Philipbar et al.* v. *Darby et al.* (1936), 85 F. (2d) 27, 30 (C. C. A. 2).

The interest of the corporation in the judgment was double in this case. First, since the relation between the

corporation and its stockholders by the issue of stock is contractual (*Department of Treasury of Indiana* v. *Crowder* (1941), 214 Ind. 252 (15 N. E. (2d) 89); *Fletcher Cyclopedia Corporations* (1932), Section 5083, page 33, Vol. 4, Note 73; *Kennedy* v. *Central Power Co.* (1941), 129 Neb. 637 (226 N. W. 504); *Schroeter* v. *Bartlett Syndicate Building Corporation* (1942), — Cal. App. —, 55 P. (2d) 1221; *Crimmins & Peirce Co. et al.* v. *Kidder Peabody Acceptance Corporation et al.* (1933), 282 Mass. 367 (185 N. E. 383, 388), it is necessarily involved in any suit to cancel such a contract. The case fails within the principles laid down in *Shields* v. *Barrow* (1856), 17 Howard 139, 141, where it is held that it was "a principle of jurisprudence" and that—

> "a court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent party, that a complete and final justice can not be done between the parties to the suit without affecting those rights."

Shields v. *Barrow* has been followed by the Supreme Court of the United States many times.

In the second place the final judgment in part consisted of an injunction against the Sales, respondents herein, "from issuing to themselves, or any other persons, certificates for shares of stock from the unissued shares of the capital stock of said corporation for a sum or sums of money or for property less than the par value of said shares of the corporation stock." (See Prayer of Complaint R. 15-16—Text of Temporary Injunction R. 2—and Final Judgment, R. 26-27).

That the corporation is essentially interested in any injunction pertaining to the issue or sale of its stock is so obvious that the citation of authorities is not even necessary.

From the foregoing it appears that the two holdings of the Supreme Court of Indiana namely, that the corporation was not a necessary party and, if it was a necessary party, it had been joined as an appellant through the agency of the parties adverse to it, are clearly unsubstantial and ill-founded and do not furnish adequate or independent non-Federal grounds to obviate the failure of the State Supreme Court to decide the federal questions present in express terms which were, of course, necessarily decided as a result of the holding that it had jurisdiction.

Also the cross-petitioner urges that the questions of the interest of the petitioner and of the validity of the action of its then officers, who were adverse to it, joining it as an appellant when its only interest was to retain the benefit of the judgment and when it was without interest to appeal, are all so intertwined and implicit in the assertion and determination of the constitutional questions as to make these questions federal questions, properly and exclusively within the determination of the Supreme Court of the United States.

Ward v. *Love County* (1920) 253 U. S. 17, 22, 23 (64 L. Ed. 751, 758);

Lawrence v. *State Tax Commission* (1931) 286 U. S. 276, 282, 283 (76 L. Ed. 1102, 1107) and cases cited therein;

Enterprise Irrigation District v. *Farmers Mutual Canal Co.* (1916) 243 U. S. 157, 164, (61 L. Ed. 644, 649);

Leathe v. *Thomas* (1907) 207 U. S. 93, 99 (52 L. Ed. 118, 120).

IV

4. Legal Basis of Cross-Petitioner's Contentions.

The grounds upon which this cross-petitioner, as well as the petitioner, Wabash Valley Coach Co., asserted the null-

ity of the joinder of the Wabash Valley Coach Co. were sound. They were:

(a). The respondents, Gertrude B. and Burwell W. Sale, as officers of Wabash Valley Coach Co., sustained a trust relationship toward the Wabash Valley Coach Co., and were thereby bound to act in its interest and against their own personal interests.

(b). In joining the Wabash Valley Coach Co. as an appellant from the judgment cancelling certain shares of stock claimed by them and ordering these shares surrendered to the corporation, the Sales were acting in their own interest and against the interest of their *cestui*, and likewise in respect to the final injunction forbidding the two Sales, the then officers of the company from selling its stock for less than par.

(c). The personal interest of the two Sales was to reverse the judgment against them, while the interest of the corporation was to sustain the judgment.

(d). This conflict of interest rendered void the act of the two Sales in joining the Wabash Valley Coach Co. as an appellant under *Pepper* v. *Lytton*, supra; *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 and *Glasser* v. *United States* (1942) 315 U. S. 60, 76.

(e). Consequently no notice being given to Wabash Valley Coach Co., its officers being disabled for the foregoing reasons from waiving notice of the appeal, it follows that the corporation was never made a party to the appeal proceedings.

(f). Consequently the Supreme Court of Indiana had no jurisdiction.

It is the law in Indiana, as in the courts of the United States, that the executive officers of a corporation sustain a

trust relation to the corporation. *Pepper* v. *Lytton* (1939) 308 U. S. 295, 306, 311; *Port et al.* v. *Russell et al.* 36 Ind. 60, 65, 66; *Zaring* v. *Kelly* (1920) 74 Ind. App. 581, 583 (128 N. E. 657, 658); *Schemmel* v. *Hill* (1930) 91 Ind. App. 373, 383, 385 (169 N. E. 678, 681, 682); *Wainright* v. *P. H. & F. M. Roots Co.* (1921), 176 Ind. 682 (97 N. E. 8, 11, 12); *Twin-Lick Oil Co.* v. *Marbury* (1875) 91 U. S. 587, 588 (23 L. Ed. 328); *Washburn* v. *Green* (1890) 133 U. S. 30, 43 (33 L. Ed. 516, 521); (See also Justice Cardozo's famous opinion in *Meinhard* v. *Salmon* (1928) 249 N. Y. 458, as to the high standard of conduct required of trustees).

The Supreme Court of Indiana made no change in these principles in its decision in this case.

The betrayal of the interests of the corporation by its officers in their own selfish interest is of course not fair play, and dual representation resting on such breach of trust should succumb to the infirmity inherent in unfair play, which is a violation of the Fourteenth Amendment of the Constitution. *MacDonald* vs. *Maybee* (1917) 243 U. S. 90, 91; *Chambers* v. *State* (1940) 309 U. S. 227, 236, 237; *Millikin* v. *State* (1940) 311 U. S. 457, 463; *Mooney* v. *Holohan* (1934) 294 U. S. 103, 112, 113, (79 L. Ed. 791, 794); Dual representation resting on breach of trust should succumb to the same infirmity.

The present case exhibits the lack of the same due process on account of dual representation condemned in *Hansberry* v. *Lee* (1940) 311 U. S. 32, 45 and *Glasser* v. *United States* (1942) 315 U. S. 60, 76 except it is here present in a more extreme form.

The impropriety of the same attorney acting for a fiduciary and *cestui* having adverse interests is expressly recognized in *Groninger* v. *Fletcher Trust Co.* (1942) 41 N. E. 140, 141, 142, (Indiana official report unpublished) where the court said:

> *"In such cases, of course, neither the fiduciary nor the attorney for the fiduciary should act for the trust, and courts will see that in such cases disinterested persons are appointed to represent the trust."* (Our italics).

Unauthorized appearance of attorney for a defendant produces lack of due process and a judgment rendered on such appearance is a nullity. *National Exchange Bank* v. *Wiley* (1904) 195 U. S. 257, 270, (49 L. Ed. 184, 190); *Hall* v. *Lanning* (1875), 91 U. S. 160, 169, 170 (23 L. Ed. 271, 274, 275); *Shelton* v. *Teflin et al.* (1848) 6 How. 163, 186 (12 L. Ed. 158, 167).

Under the theory of the stockholder's suits, the Wabash Valley Coach Co. being benefited thereby could not appeal from the judgment below in the very nature of things. *Clark et al.* v. *Stout* (1914) 183 Ind. 329 (105 N. E. 567); *Kaiser et al.* v. *Portage* (1929) 198 Wis. 581, 582 (225 N. W. 188); *Cantor et al.* v. *Sachs et al.* 18 Del. Ch. 359, 365, 366, where the court, speaking of a derivative stockholder's bill, said:

> "Any recovery granted by the decree is necessarily in favor of the corporation."

The foregoing are also the views of the petitioner which are restated above and concurred in by this cross-petitioner.

This cross-petitioner also notes and concurs in the following statement made by Wabash Valley Coach Co. in its Petition herein for Writ of Certiorari. Petitioner insists the present is a flagrant instance of the vice of the dual representation of interests in actual conflict, aggravated by the circumstance that the dominant parties constraining the selection of their own counsel as counsel for their adversary were also its trustees. The necessarily invalidating effect of such conduct from the standpoint of due process

of law under the Fourteenth Amendment has never been in terms pronounced by this Court, although such a situation is undoubtedly within and requires the application of the foregoing and analogous precedents. Both from the standpoint of national interest and importance and the unique grievance here presented this case clearly merits the granting of the writ prayed.

The cross-petitioner further refers to the authorities set out in support of the foregoing statement in the original petition herein, and in the views therein urged as to the national importance of the settlement of the issues raised in this case.

This cross-petitioner urges that this case is controlled by *Hansberry* v. *Lee* and *Glasser* v. *United States, supra,* that the Supreme Court of Indiana decided the case contrary to the principles therein held. That the case is novel in respect to the factual situation; that the case was also decided contrary to the decisions of this Court in *Shelton* v. *Teflin* (1848) 6 How. 162, 186; *Hall* v. *Lanning* (1876) 91 U. S. 160, 170; *National Exchange Bank* v. *Wiley* (1904) 195 U. S. 257, 270, where it is held that want of due process vitiates judgment obtained through unauthorized appearance of counsel; also the principle held in *Wetmore* v. *Karrick* 205 U. S. 141.

Also the principles held in the cases which hold that the lack of notice vitiates final decree under the Fourteenth Amendment. *Windsor* v. *McVeigh* (1876) 93 U. S. 274; *Pennoyer* v. *Neff* (1878) 95 U. S. 714, 733.

Cross-petitioner also notes that the mere circumstance that the want of due process transpires within the proceedings below, the Supreme Court itself does not obviate the application and enforcement of the Fourteenth Amendment. *Saunders* v. *Shaw* (1917), 244 U. S. 317, 320; *Brinkerhoff-Farris, etc., Co.* v. *Hill* (1930), 281 U. S. 673, 681,

682; *Carlson* v. *Washington ex rel.* (1914), 234 U. S. 103, 106 (58 L. Ed. 1237, 1238).

V.

5. The Right of Cross-Petitioner to Assert the Claim of Constitutional Right on Behalf of the Corporation and Also on His Own Behalf.

Charles A. Turner, the Cross-petitioner, sued both on behalf of himself as a stockholder and the other stockholders and particularly on behalf of the corporation. It was the corporation's right that he was asserting in seeking to cancel the shares held by the Sales and in seeking an injunction against the issue of further stock by the corporation for less than par. The validity of a share of stock, the propriety of issuing authorized stock for less than par necessarily affect both the right of the stockholder and of the corporation. As appears in the cases cited above a share of stock is contractual in its nature.

It does not seem possible in the nature of things to declare invalid the issue of outstanding stock without affecting the interest of the corporation, the interest of the stockholders in that corporation and the interest of the persons holding the cancelled stock. The same is also true with reference to the issue of said stock by the corporation. This being true, the primary legal issue involved, namely, the validity of the outstanding stock and the propriety of enjoining further sale for less than par are issues which are not capable of being divided. Such issues are integral. It is inconceivable that the shares of stock involved could be valid as to the persons holding them but invalid as to the corporation issuing them, or vice versa.

The stockholder may raise the constitutional question where it involves his interest in a corporation, the same

as a corporation may raise a constitutional question affecting its stockholders or creditors. *Provident Institution for Savings etc.* v. *Malone* (1911) 221 U. S. 660, 663, 664; *Soc. of Sisters etc.* v. *Pierce* (1925) 258 U. S. 532, 535; *United States* v. *Butler* (1936) 297 U. S. 1, 57, 58, 59.

In the present case the issues could not be disposed of on account of their nature as noted above without the presence of all indispensable parties. *Shields* v. *Barrow* (1856) 17 How. 139, 131 declared:

> "A Circuit Court can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice can not be done between the parties to the suit without affecting those rights."

And again:

> "But if the case can not be thus completely decided, the court should make no decree."

It then dismissed the case. The court referring to the enabling act said:

> "* * * it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned." i.e. Mallen *v.* Hinde 12 Wh. 198; Shields *v.* Barrow is followed in State of California *v.* Southern Pacific Co. (1895) 151 U. S. 229, 251; Bogart *v.* Southern Pac. Co. (1913) 228 U. S. 137, 146, 147, 148.

Section 452 of the New York Civil Code was permissive in form, the same as was Equity Rule 47 of 1842 considered in *Shields* v. *Barrow*. In *Mahr* v. *Norwich Union Fire Ins.* (1891) 172 N. Y. 471, the Circuit Court of Appeals of New York held that the fundamental principles of jurisprudence inhibited the consideration of matters where the controversy could not be completely settled in the absence of indispensable parties.

The Indiana Civil Code, Section 2-222 (BRS—1933) is the verbatim reactment in 1881 of Section 22 of the Code of 1852. This code provision is mandatory in terms requiring that

> "when a complete determination of the controversy can not be had without the presence of other parties, the court must cause them to be joined."

In *Bittinger* v. *Bell* (1865) 65 Ind. 445, 452, this act before re-enactment was declared to be mandatory "by the letter" of the statute. *Buchanan* v. *Morris* (1926) 151 Ind. 385, declared that the general provisions of the civil code govern the practice in the State Supreme Court, there being no other rule to the contrary. The principle of the integral issue preventing the determination of the case in the absence of indispensable parties is illustrated in *Bellaire* v. *B. O. Ry. Co.* (1892) 146 U. S. 16, 17; *Kohl* v. *United States* (1876) 91 U. S. 367, 377, 378.

The recognition in *Shields* v. *Barrow,* supra, that this is a principle of jurisprudence rising beyond the question of formal jurisdiction places this principle within the Fourteenth Amendment of the Federal Constitution, at that time not yet adopted, since what is involved here is a concept of fair play which of course is embodied in the Fourteenth Amendment.

From the foregoing it clearly appears that the cross-petitioner was entitled to assert the constitutional right in so far as it involved the jurisdiction of this Court to proceed in the absence of the petitioner-corporation, both for himself and for the corporation and he did so in his Motion to Dismiss which was necessarily overruled by the State Supreme Court when the State Supreme Court proceeded to decide the case below on the merits.

Since under the rationale of stockholder's suits the corporation had to be brought into court by the cross-petitioner (plaintiff) to enable the corporation both to be bound and

get the benefit of the judgment obtained for its use, the stockholder-plaintiff in the trial court could litigate only in its presence, and therefore had the duty of bringing it into that court. Once, however, the judgment for the use and benefit of the corporation is obtained, the corporation itself could not appeal being benefited by the judgment, (*Clark et al.* v. *Stout* (1914) 183 Ind. 329; *Kaiser et al.* v. *Portage* (1929) 198 Wis. 581, 582; *Cantor et al.* v. *Sachs et al.* (1937) 18 Del. Ch. 359, 365, 366); but an appeal after term is an institution of a new proceeding. The Supreme Court of Indiana has distinctly held that the assignment of errors is the complaint of the appellants. *Steel* v. *Yoder* (1915) 58 Ind. App. 633; *Crumpacker et al* v. *Manhatten Lumber Co. et al.* (1916) 185 Ind. 493, 494.

After the rendition of the judgment below the corporation went out of court with the vested right to a judgment in its favor. It could be brought back only by notice to it (*Wetmore* v. *Karrick* (1907) 205 U. S. 144).

A petition for rehearing was filed in the Supreme Court of Indiana by the cross-petitioner, Charles A. Turner, on February 2, 1943, within 20 days from the judgment as allowed by the Supreme Court Rules (R. 125). It was overruled on February 8, 1943 (R. 131).

VI.

(Separate Assignments of Error.) Reasons for Allowance of the Writ.

1. The court erred in its judgment reversing the final judgment of the trial court thereby erroneously denying the claim of right alleged to arise under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and set up by this cross-petitioner in his Motion to Dismiss the Appeal in the Supreme Court of Indiana, inasmuch as no notice of the pendency of said appeal was given as required by the Statutes of the State to the Wabash Valley

Coach Co. and the purported joinder of said Company as an appellant was void under said constitutional provision because the joinder was made by dual representation of adverse interests and in breach of the trust duties of the respondents, Gertrude B. Sale and Burwell W. Sale.

2. In this case there was specifically claimed by this cross-petitioner in the Supreme Court of Indiana, the right of Wabash Valley Coach Co., on whose behalf the cross-petitioner instituted the original action, which right was specifically asserted to be derived from and based upon Section 1 of the Fourteenth Amendment of the Constitution of the United States to appear, to be heard and to be bound in said cause in said Supreme Court only by and through counsel of its own independent selection, and not to be bound by counsel selected by the parties adverse to it in interest and who in breach of their fiduciary obligation as its officers at the time were seeking to reverse the judgment of the trial court which was beneficial to the petitioner, Wabash Valley Coach Co., which claim of right was erroneously denied by said State Supreme Court.

3. The Supreme Court of Indiana erred in denying the claim of this cross-petitioner under Section 1 of the Fourteenth Amendment of the Federal Constitution that the Supreme Court of Indiana had no jurisdiction to proceed and reverse the judgment therein appealed in the absence of Wabash Valley Coach Co. for whom said judgment being appealed was obtained, inasmuch as said Company had not been given notice of the appeal as required by the Statutes of the State and inasmuch as its purported joinder as an appellant was void under said constitutional provision which claim of right was set up in the Motion of the cross-petitioner to Dismiss the Appeal.

4. The Supreme Court of Indiana erred in holding that the Wabash Valley Coach Co. had voluntarily appeared

in said cause as an appellant through the agency of the same legal counsel who had been selected by and represented its officers, then and there its fiduciaries and adverse in interest in respect to the judgment appealed in said cause, thereby erroneously denying the claim of right of said Wabash Valley Coach Co. derived from and based upon Section 1 of the Fourteenth Amendment of the Federal Constitution, that the said dual representation was a denial of due process of law and the equal protection of the laws thereunder.

5. The court below erroneously held it had jurisdiction to proceed and to reverse the judgment of the trial court, and thereby erroneously ruled against and denied the claim of right of this cross-petitioner set up in his Motion to Dismiss the Appeal based upon the first section of the Fourteenth Amendment of the Constitution of the United States, claiming the appeal was *coram non judice* for want of notice to the Wabash Valley Coach Co. and on account of the nullity of the joinder of said company as an appellant through void, dual representation of legal counsel.

6. The court below erroneously held it had jurisdiction to proceed and to reverse the judgment of the trial court and erroneously ruled against and denied the claim of right of said petitioner on behalf of the Wabash Valley Coach in his motion to Dismiss the Appeal based upon Section 1 of the Fourteenth Amendment of the Federal Constitution, claiming the appeal was *coram non judice* for want of notice to said Wabash Valley Coach Co. (petitioner herein) and on account of the nullity of the joinder of said company as an appellant through void, dual representation of legal counsel.

7. The Supreme Court of Indiana erred in holding that the Wabash Valley Coach Co. (petitioner herein) was only a nominal party to the judgment appealed from.

VII.

WHEREFORE, your cross-petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Indiana, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of Indiana had in the case numbered and entitled on its docket, No. 27,718 Wabash Valley Coach Co., Gertrude B. Sale, as President of the Wabash Valley Coach Co., Burwell W. Sale as Secretary-Treasurer of Wabash Valley Coach Co., Gertrude B. Sale, Burwell W. Sale, Appellants v. Charles A. Turner, Appellee, to the end that this cause may be reviewed and determined by the court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of Indiana be reversed by the Court; and that to the extent permitted under the Statutes and Rules of this court that there be available to him for the purposes of his cross-petition the certified transcript heretofore filed in this court by the petitioner, Wabash Valley Coach Co., herein, and for such further relief as to the court may seem proper.

Dated April 12, 1943.

CHARLES A. TURNER,
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